

**MINUTES OF THE
UTAH CONSTITUTIONAL REVISION COMMISSION**
September 10, 1999 - 9:00 a.m. - Room 405 - State Capitol

Members Present:

Mr. Alan L. Sullivan, Chair
Dr. Jean B. White, Vice Chair
Rep. Afton B. Bradshaw
Justice Christine Durham
Mr. Robin Riggs
Mr. Morris Linton
Speaker Martin R. Stephens
Prof. Kevin Worthen

Members Absent:

Ms. Diana Allison
President Lane Beattie
Sen. Mike Dmitrich
Rep. David M. Jones
Mr. Dallin W. Jensen
Mr. W. Craig Jones
Sen. Howard C. Nielson
Mr. Richard V. Strong

Staff Present:

Mr. Jerry D. Howe,
Research Analyst
Mr. Robert H. Rees,
Associate General Counsel
Ms. Cassandra Bauman,
Legislative Secretary

Note: A list of others present and a copy of materials distributed in the meeting are on file in the Office of Legislative Research and General Counsel.

1. **Call to Order** - Chair Sullivan called the meeting to order at 9:04 a.m.
2. **Proposal Concerning the Airline Tax Apportionment Issue** - Mr. Rees distributed a draft resolution titled, "Property Tax Resolution- Airline Property Taxes" while Chair Sullivan provided some background information about the issue involved in the case of Salt Lake City v. Property Tax Division, 368 Utah Adv. Rep. 36 (Utah 1999).

Rep. Wayne Harper explained that the draft resolution authorizes the Legislature to distribute revenues from a state-imposed property tax on commercial aircraft to local governmental entities. He explained that since the airlines doing business at the Salt Lake City International Airport are patronized and supported by all residents of the state, any property tax revenues collected from commercial aircraft should accrue to the benefit beyond Salt Lake County.

Chair Sullivan explained that a federal problem with federal statute, 49 U.S.C. 40116(c), was raised during litigation, but that the Supreme Court did not settle the federal question because it decided the case on state constitutional grounds. He asked if this resolution creates a problem under the federal statute.

Rep. Harper explained that this is not a problem because the resolution does not deal with

the locally assessed property tax. The resolution permits a state-wide property tax to be assessed uniformly, and the Legislature will determine how the revenue will be allocated.

Rep. Bradshaw asked if Rep. Harper knew whether the airlines supported the resolution. Rep. Harper stated that he has not formally spoken with the airlines because he wanted the issue discussed by the Commission first.

Rep. Harper clarified that the resolution was not intended to increase taxes, but rather to allow the revenue to be distributed among more entities. Chair Sullivan noted that instead of a locally imposed tax, the resolution provides that the tax would be collected by the state, which in turn would allocate the revenue as it determines appropriate.

Mr. Riggs asked if there was a bill prepared to implement this constitutional amendment. Rep. Harper said that since the resolution would not be able to be dealt with until the 2001 General Session, provided, of course, the resolution passes, no work has been done regarding implementing statutes.

Motion: Rep. Bradshaw moved that the Commission move on to the next item on the agenda. The motion passed unanimously with Mr. Linton and Mr. Riggs absent for the vote.

3. Judicial Retention Elections - Chair Sullivan explained that the Commission has been discussing Article VIII, Section 9 of the Utah Constitution dealing with Judicial Retention Elections. He said that a number of issues had been raised last year when Rep. Katherine Bryson presented a resolution to the Commission which proposed to allow the Legislature authority to increase the pass rate for judicial retention elections from a majority vote up to 65 percent of the vote. He explained that the Commission decided not to support the resolution last year during its limited review, and that since then Rep. A. Lamont Tyler requested a more thorough study by the Commission.

Chair Sullivan stated that there seems to be a fair amount of interest in the House of Representatives to change the retention election provisions. He further explained that the merit selection process, the retention election process, and the disciplinary process set out in Article VIII are all interrelated, serving the objectives established by the 1983 Commission which were explained by Chief Justice Hall when the Judicial Article was adopted. Chief Justice Hall explained that the objectives of the Judicial Article are: "to protect the status of the judicial branch" and "to provide the means to develop a more efficient and effective judicial system" and "to attract and maintain quality judges." The Commission is interested in the Judicial Conduct Commission, he said, because it is part of the disciplinary process. Our discussion today, he said, is intended to assist the Commission's deliberation on this issue.

Mr. Francis Wikstrom, former Chair of the Judicial Conduct Commission, explained the composition of the Conduct Commission, emphasizing that all members are hard-working volunteers. He explained that most of the complaints against judges are not within the jurisdiction of the JCC. As a result, he said, about 90 percent of complaints are dismissed. The JCC is permitted to investigate complaints, he said, but it is constitutionally required to conduct its business confidentially. The Conduct Commission does not solicit complaints, he said, explaining that there is probably improper conduct occurring without the commission's knowledge. Notwithstanding, he said, the constitution is clear that the JCC is to conduct investigations and hearings on the complaints it receives. In this respect, the JCC is effective in meeting its constitutionally established duties.

When complaints merit investigation, he explained that it is sometimes difficult to uncover sufficient evidence. There is a fine balance, he said, between accountability and independence which the commission attempts to successfully navigate. He expressed a concern that judges may fear a negative public reaction when making courageous legal decisions on tough issues. He emphasized that the difficulty in placing members of the judiciary under substantial scrutiny is that it has the potential of undermining judicial independence.

Prof. Worthen clarified that the JCC cannot investigate potential misconduct without a formal complaint. Mr. Wikstrom acknowledged that is the case but mentioned that the JCC has adopted a rule allowing its Executive Director to draft charges so that the entire JCC may vote on whether to accept the charge as a complaint. He emphasized, however, that the JCC does not seek out judicial misconduct. Concerning the retention election, Mr. Wikstrom advised against opposed elections, explaining that the merit selection process employed by the state has provided exceptional judges. Of the options considered by this body at its last meeting, Mr. Wikstrom explained that we could improve the amount and quality of the information we provide about judges prior to retention elections.

Justice Durham asked Mr. Steve Stewart, Executive Director of the Judicial Conduct Commission, whether there was a national information source that the JCC may consult concerning what other states are doing with regards to disciplining judicial misconduct. Mr. Stewart replied that the JCC belongs to two such organizations: the Association of the Judicial Disciplinary Counsel and the American Judicature Society.

Mr. Stewart then discussed the procedures of the Judicial Conduct Commission, reviewed its statistical report concerning the number of cases and complaints, discussed its proposed Handbook, and explained its effectiveness in terms of meeting the constitutional obligation of investigating complaints against judges and justices in the state's judiciary.

Mr. Stewart explained that once a complaint is received, it is reviewed by an investigator

who conducts a preliminary review and writes a report. If there is a potential violation of the Code of Judicial Conduct, then there is a recommendation that the judge be notified and asked to respond to the complaint. Mr. Stewart said that he reviews the investigator's report, and, if he agrees that a violation has occurred, he prepares a letter to the judge requesting an explanation of the situation. With the judge's response, Mr. Stewart said that he then writes a supplemental report to members of the commission, explaining the complaint, the investigator's evidence, and the judge's response, including his recommendation on the issue. The Conduct Commission then reviews his report, he said, and then decides whether to commence a formal hearing.

Mr. Linton asked if the name of the complainant is disclosed to the public. Mr. Stewart explained that the complainant's name is disclosed only to the judge who is the subject of the complaint.

If the Conduct Commission votes to proceed with a formal complaint, Mr. Stewart explained that he then serves the judge with a formal complaint. Upon finding reasonable cause to commence formal charges, the confidential formal hearing is held. The JCC issues subpoenas, hears testimony and then will either dismiss the complaint or resolve it with a range of sanctions which include: public reprimand, censure, suspension, removal, or involuntary retirement. Up to this point, everything is confidential, he said. He emphasized the JCC is very careful not to disclose information except what is necessary to prepare for the hearing and conduct its investigations. Once the hearing is concluded and the JCC has issued a finding (unless it is dismissal), the entire record, including the transcript of the formal hearing, is referred to the Supreme Court for review. The Supreme Court will not overturn the JCC's findings and conclusions unless there is an error, he said. This is a mandatory review on both law and fact after which the Supreme Court may implement, reject, or modify the JCC's findings.

Mr. Stewart explained that the Conduct Commission is extremely effective even though it has received criticism for not dismissing many judges for misconduct. What is not realized, he said, is that most complaints are not punishable by dismissal. In fact, 85 to 90 percent of all complaints are dismissed because they either have no merit or cannot be proven. Of the 10 to 15 percent of complaints not dismissed, many judges resign rather than have the process continue through a formal hearing, he said. Because of these "voluntary retirements," most cases that would logically conclude with removal of the judge never materialize. Consequently, few of the formal hearings result in removal of a judge because the judge has already removed him or her self by retiring.

Justice Durham explained that the daily news papers have carried a few articles about private reprimands of judges. She questioned how that information could be available. Mr. Stewart responded that the JCC is confined to confidentiality and the only two exceptions are when a judge consents to it or the Supreme Court authorizes its release. If the Supreme Court

did not release the information in the cases in the paper, he said, then the judges must have authorized or agreed to its release unless the complainant has leaked information to the press. Although he explained this may have happened in the past, the Conduct Commission is careful only to disclose whether a complaint has been dismissed, as required by state law.

Mr. Stewart then explained that it is a fine line balancing judicial accountability and judicial independence. Several years ago the Conduct Commission commissioned a task force to make a recommendation as to when information should be released, he said. The task force recommended that all proceedings remain confidential until the time that the records are transferred to the Supreme Court. There are opposing views among our members concerning this issue, he said, and there is some information on this issue in our handbook. In 34 states, proceedings of conduct entities become public at the time formal charges are filed against the judge. Utah is one of 13 states where the information does not become public until after the record has been transferred to the Supreme Court. The Conduct Commission's recommendation is clearly articulated in its policies, yet we recognized that the issue of confidentiality is a policy question within the jurisdiction of the Legislature.

Speaker Stephens questioned this policy and suggested that neither the public, members of the executive branch or members of the legislative branch enjoy the privilege of having complaints concerning their misconduct confidential.

Mr. David Nuffer, Chair of the Judicial Conduct Commission, distributed a handout titled, "Judicial Accountability in Utah." He explained that selection, retention, and discipline are all components of judicial accountability. Judicial accountability exists because we believe in the principles of judicial independence, he said. The U.S. Constitution is probably the most dramatic in establishing judicial independence by granting life-time tenure to judges. He said the Utah Constitution does not grant life-time tenure to judges although it seems to contemplate an independent judiciary. He explained the importance of, and that the people deserve, an independent judiciary. The people also deserve judicial accountability, he said. That is why, in meeting its constitutional charge, the JCC receives and reviews a hefty packet of materials prior to each meeting. The information we review is thorough and complete. No complaint is dismissed without this sort of review, he said.

Unfortunately, he said, there are people willing to file complaints who have issues in the court that could or should be in the process of being appealed. Such complaints usually have little basis on the conduct or fitness of the judge. He stated that the JCC is a deliberative body that takes its work seriously. The composition of the Conduct Commission is very diverse. Members are cordial, but they often disagree. The Conduct Commission is well educated in terms of its constitutional duties and it performs those duties with integrity.

Mr. Nuffer explained that where practicable, the Conduct Commission is moving toward more openness by requiring a formal proceeding or ensuring that the judge stipulate to some sort of public disclosure where there is already an issue of public awareness. He said the Conduct Commission feels this is important to maintain public confidence in the process.

Justice Durham said that in a recent review of the "Judicial Conduct Reporter," she read some serious reports of judicial misconduct. She explained that her impression is that Utah does not see the level of outright scandal that is reported in other states. She asked if Utah judges are out of control in terms of the disciplinary action required. Mr. Nuffer said that he agrees that Utah does not have the scandals and the outrageous behavior that other states seem to experience, because, he speculated, of Utah's merit selection process.

Judge Gordon J. Low, member of the Judicial Conduct Commission, explained that the Judicial Article of the Utah Constitution has improved the Utah Judiciary. Of course there are a few problems, there always are, he said. Yet providing that a super majority vote is required to maintain one's judicial position is extreme. Super majority votes are rare, he said. Indeed, judges go through more scrutiny than any other officer. Increasing the required percentage in judicial retention elections is highly unnecessary, and may, he warned, result in the removal of highly qualified judges.

Sen. Pete Suazo, member of the Judicial Conduct Commission, stated that he has experienced some frustration with the length of time it takes the Supreme Court to make a decision on the recommendation of the Conduct Commission. He expressed concern that the public was unaware of the situation in the recent Young case at a time when they needed and deserved the information -- before the retention election. The Court, he explained, seemed to have ample time to make its decision. But, as it went, the public voted for retention of the judge without the benefit of the information that the Court later agreed merited a serious public reprimand. The Court, he said, should be more timely in this respect so the public may make informed decisions at retention elections.

Rep. David Ure, member of the Judicial Conduct Commission, stated that the Utah Judiciary is not out of control and that he does not want to see the judiciary subject to opposed retention elections. He admitted frustration in not being able to investigate many complaints that seem to him to warrant an investigation. Some complaints, as we have seen in the past, he said, arise from serious judicial misconduct, occasionally even criminal misconduct. In the beginning of these complaints, we do not know which direction the case will take. Indeed, he said, it is my fear that many of the cases we dismiss contain serious misconduct. The statutes need to be changed, he said, so that the Conduct Commission may coordinate investigations and share information with other entities; or at a minimum, the Conduct Commission needs to be required to report criminal misconduct to the proper prosecuting authority. What is currently happening with respect

to confidentiality is extremely troubling, he said.

Concerning an increase in the judicial retention election, Rep. Ure explained that it would be a good idea to increase the percentage because it is a way to improve judicial behavior without jeopardizing judicial independence. No judges are likely to be removed by an increased percentage, he said, but it is likely judges will be more polite and respectful to litigants and counsel if this is in effect. Notice that nearly 90 complaints are dismissed each year primarily concerning accusations that the judge lost his or her temper, used inappropriate language, or was simply rude. This behavior would stop, he said, if the judge realized that he needed a 65 percent approval rating rather than a simple majority.

Ms. Sylvia Bennion, member of the Judicial Conduct Commission, suggested that judicial behavior could be improved if the Conduct Commission were more open to the public and the press. She explained that confidentiality should cease when formal charges are brought against a judge. In Utah, confidentiality ceases when the record is presented to the Utah Supreme Court, unless the accused judge can show cause why the record should remain confidential. In many cases this information is several years old when it is referred to the Supreme Court. She continued that when the Confidentiality Task Force issued its report in 1996, the majority thought that the confidentiality should be maintained until the Conduct Commission could establish a positive track record. That track record has now been established, she said, and it is time to open formal hearings to the public.

Rep. Gary Cox, member of the Judicial Conduct Commission, stated that the quality of Utah judges is a positive reflection on the entire criminal justice system. He said that he disagrees with Rep. Ure concerning the increased retention percentage. It would be more productive, he argued, for the Conduct Commission to provide more information to the voting public about judges and their records, rather than requiring a higher percentage of votes in retention elections. He said that he is receiving many calls from constituents on this subject. People are telling me, he said, that they are tired of being asked to vote for someone that they know very little about.

Speaker Stephens asked for clarification concerning the confidentiality issues decided by the Confidentiality Task Force. Judge Low explained that confidentiality is preserved during the hearing process because when charges are dismissed the integrity of the judge is not tarnished. If this process were public, reputations would be scarred, he said. Speaker Stephens asked what the difference is between a judge with a false charge and any other person who may have to defend himself against a false charge. Judge Low explained that the judge represents the whole judiciary and when formal charges are public the entire judiciary is impacted. Mr. Wikstrom explained that under the Judicial Code of Ethics, a judge is prohibited from going out in public to defend himself or herself, so the recommendation of confidentiality was adopted.

Chief Justice Richard C. Howe, Chairman of the Judicial Council, stated that judicial selection and retention are concepts fundamental to the independence of the Judicial Branch of government. Changes to these processes should not be undertaken lightly, he said. He discussed his concern about the apparent assumption being made that retention elections have little merit because only one judge has been removed. Retention elections have substantial influence on judicial behavior, he said, as evidenced by judges selecting early retirement rather than face a retention election.

Chief Justice Howe explained that it should be expected that judges selected on merit will not often be removed by a retention election. This is not to say, however, that judges do not engage in occasional misconduct. Indeed, even the Judicial Council has worked to correct errant judges, in similar manner as the Judicial Conduct Commission. Let everyone understand, he said, that we take misconduct in the judiciary seriously. That is why the JCC has been given the resources to effectively investigate allegations of unethical conduct. If the infraction is serious enough, the Conduct Commission recommends discipline to the Supreme Court and the Court has been very supportive of these recommendations, he said. He concluded that the current process is effective.

Mr. John T. Nielsen, representative of the Utah State Bar Commission, said that the options discussed at the Constitutional Revision Commission's last meeting will not necessarily remove poor judges. He stated that there is ample evidence to suggest retention elections positively influence judicial behavior. The retention elections help the public become better informed about the judiciary. Although rare, he said, judges have been removed in this process when the public is sufficiently informed. He said that the retention election can certainly be improved, but moving toward any type of opposed election will not be supported by the State Bar.

Mr. Nielsen presented four principles that the Utah State Bar Commission believes are absolutely fundamental in this debate. First, retention elections are not designed to be and should not be popularity contests, although issues of judicial demeanor, competence, integrity, adherence to ethical standards are all valid measures. Second, judicial independence to make decisions according to the law cannot be infringed. Retention elections must not be altered in such a fashion as to make them susceptible to pressure from special interests, he said. Third, the Bar Commission rejects any option that returns to the opposed election of judges. He said that requiring judges to stand for election is not only unseemly, but it is rejected in most other jurisdictions. Increasing the vote requirement in retention elections might result in the rejection of competent judges for all the wrong reasons. Finally, of all the options presented to improve judicial behavior, the State Bar Commission urges a study of providing additional information to the public, noting that the public would be served better if it could be effectively educated with respect to the judiciary. Mr. Nielsen then explained that the Utah State Bar Commission believes

that the issue of policing the judiciary should be left to a strong and effective Judicial Conduct Commission, which Utah is fortunate to have.

4. Commission Discussion - Justice Durham said that it might be wise for the Commission to discuss this issue at its next meeting when more members are present. Speaker Stephens said that it doesn't appear that the Commission is interested in making changes to the status quo so he suggested that the Commission move on to other issues. Chair Sullivan reminded the Commission that it owes a report to Rep. Tyler and others. Mr. Linton said that it may benefit the Commission if it could hear from the other side of the issue before it makes a decision. He suggested that the minutes from today's meeting be provided in advance to the presenters at our next meeting.

Chair Sullivan suggested that the Commission discuss the retention election provisions at the next meeting, including a discussion on the options that have been presented for our consideration. He said that he hopes at the end of that discussion, the Commission will be ready to make a recommendation so staff may begin drafting the report.

5. Other Business - The next meeting will be on Friday, October 15, 1999 at 9:00 am in room 405.

6. Adjourn -

MOTION: Prof. Worthen moved to adjourn the meeting at 11:40 a.m. The motion passed unanimously with Mr. Riggs and Rep. Bradshaw absent for the vote.

